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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-980

H. CLIFFORD LEE, CLARENCE J. BASSLER, JR., and THE COMMERCIAL BANK AT WINTER PARK, Co-Executors of the Estate of Edyth D. Bush, Deceased,
Petitioners,

vs.

HERSCHEL S. ARROWOOD and MARY JANE DICKMAN, as Executors of the Estate of Archibald G. Bush, Deceased

and

THE BUSH FOUNDATION

and

WARREN SPANNAUS, Attorney General of the State of Minnesota,
Respondents.

BRIEF OF RESPONDENTS HERSCHEL S. ARROWOOD AND MARY JANE DICKMAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

HISTORY OF THE CASE

The significance of the conclusionary remarks made by the Minnesota Supreme Court expressing difficulty in comprehending the purpose of the litigation which Petitioners continue to pursue, becomes more apparent when the historical aspects of the case are considered. (Petitioners' Appendix, A30).[1]

Mr. Bush died on January 16, 1966, less than one year after executing his Will in which he left a few bequests to friends and relatives and a life estate in a Florida home to his wife. The residue he left to The Bush Foundation, which was established by him during his life. His wife consented to this disposition. (A10).[1] In view of the size of his estate, approximately $124,000,000 at the time of his death, such a modest portion passing to his surviving spouse might be expected to raise a question as to its propriety were it not for the fact that, as mentioned in his Will, he and his wife had frequently discussed their testamentary plans and had agreed to this limited bequest for her. The nature of their testamentary plans becomes evident when upon her death she was found to have left an estate of her own valued by her counsel at approximately $130,000,000. Both the execution of Mr. Bush's Will and the consent thereto by his wife, Edyth Bush, were witnessed by three attorneys, one of whom was David R. Roberts, Mr. Bush's personal lawyer.

Within six months after Mr. Bush's death, his wife threatened to renounce her husband's Will, claiming that she had

[1] Pagination preceded by the designation of Petitioners' Appendix refers to the Appendix filed with the Petition of Petitioners herein; all other references are to an Appellants' Appendix filed as part of the record in the case before the Minnesota Supreme Court whose decision Petitioners seek herein to have reviewed.

not been fairly informed of the nature and consequence of her written consent. The threat never materialized when the executors of her husband's estate entered a settlement agreement in August, 1966, from which she received $2,100,000 from the estate. Contemporaneously, the Board of Directors of The Bush Foundation gave her a veto power over the Foundation's operation. Shortly thereafter, in October, 1966, Mrs. Bush executed a new Will setting up her own foundation as the residuary legatee of her estate, designating her personal attorneys, David R. Roberts, as the attorney to probate her estate, and H. Clifford Lee, to serve as co-executor with E. G. Banks, the President of the Commercial Bank at Winter Park, Florida. Messrs. Roberts, Lee and Banks are also designated as directors of her foundation, The Edyth Bush Foundation, established by her in her Will. (A65 to A75).

Becoming displeased with both the administration of her husband's estate and the operation of his foundation (The Bush Foundation), Mrs. Bush, in January, 1968, commenced the lawsuit which culminated in the decision of Judge Godfrey, the "Godfrey judgment" of which the Petitioners now complain (Petitioners' Brief, p. 8). This decision was based on a stipulation entered in September, 1969, between all parties to that litigation, and signed by four lawyers representing Mrs. Bush. In that stipulation, she agreed to a restructuring of The Bush Foundation Board of Directors in which her veto power over The Bush Foundation was in effect surrendered.

Mrs. Bush was adjudicated to be incompetent in November of 1970, and David R. Roberts, then serving as her personal lawyer, and the Commercial Bank at Winter Park were appointed guardians of her estate. She remained an adjudicated incompetent until her death on November 20, 1972.

It is only after Mrs. Bush was adjudicated an incompetent that the instant litigation was commenced in Minnesota on October 12, 1971, by David R. Roberts and the Commercial Bank at Winter Park, who filed in Ramsey County Probate Court a resurrected document entitled "Renunciation of Will" dated August 5, 1966, and signed by Mrs. Bush, in which she claimed, in essence, that she did not know what she was signing when she consented to her husband's Will. The bar of the August, 1966, settlement agreement between Mrs. Bush and the executors of her husband's estate is being set aside by her guardians' novel assertion (among other claims) that the loss of a veto power[2] over a foundation's operation by a 90-year-old woman (after, according to the Petitioners, she has become incompetent) constitutes a material breach of that agreement.

THE QUESTIONS PRESENTED BY APPELLANTS HAVE NO BASIS IN FACT

It is claimed that in the litigation which went to judgment before Judge Godfrey, Mrs. Bush did not appear in a personal capacity. However, as observed by both the lower Court and the Minnesota Supreme Court, which held the judgment to be res judicata as to the issues now raised, she was in fact suing as an individual and did in fact receive a personal benefit from that court determination (Petitioners' Appendix, A21). That action, entitled *Bush vs. Arrowood*, Ramsey County District File No. 356691, was commenced in January, 1968,

[2] Whether such a power is contrary to public policy and therefore not lawfully exercisable has never been determined by any court though the question of its legality has been raised by the Attorney General of the State of Minnesota (A461).

by Mrs. Bush, in her name as a Class B Director,[3] together with the other Class B Directors of The Bush Foundation, H. Clifford Lee (one of her personal attorneys) and Clarence J. Bassler (her nephew), against the executors of Mr. Bush's estate and the Class A Directors of The Bush Foundation. Mrs. Bush chose this action not only to resolve personal claims and issues raised by the parties in their pleadings, but even went so far as to interject into that case the issue of the validity of her own Last Will and Testament, which Judge Godfrey, at the urging of her attorneys, made specific findings concerning its validity in his judgment, and permanently enjoined The Bush Foundation from ever making a claim against her estate by virtue of a prior Will. (A160-166 at p. 163). While in form her action may have appeared to be representative in nature, in substance it was a personal action by her and her appointees.

Petitioners' assertion that Mrs. Bush was incompetent when the "Godfrey judgment" was entered is contradicted by the record since the stipulation for judgment was agreed upon and signed on September 17, 1969, by four of her attorneys from the two law firms working on her behalf, Lord, Bissel & Brook from Chicago, and Oppenheimer, Hodgson, et al, from St. Paul. Judge Godfrey's judgment based on that stipulation was entered on April 10, 1970. The first knowledge that we have of Mrs. Bush's incompetence is on November 6, 1970, which is the date of Letters of Guardianship issued to her personal lawyer, David R. Roberts, and the Commercial Bank at Winter Park. Both Mr. Roberts, who started this action, and Mr. Lee,

[3] "Class B" was a class of directorship consisting of Mrs. Bush and her appointees, Mr. Lee and Mr. Bassler, set up by the original directors who themselves were thereafter designated as the "Class A" directors. Since the Board could not act without concurrence of both classes, Mrs. Bush through her appointees had a veto power over the Foundation's operation.

who continues this action, acting as Mrs. Bush's attorneys-in-fact, advised Judge Godfrey during the proceedings before him as late as February 2, 1970, that three of the lawyers representing Mrs. Bush in that action continued to have her authority to represent her. (Addendum p. 1). No mention was made at that time by these personal attorneys of Mrs. Bush that she was incompetent but rather the statement would lead all to believe the contrary. The present claim by the Petitioners that Mrs. Bush was incompetent during the time that her action was submitted to Judge Godfrey has not even been given a blush of color by a single affidavit from the Petitioners at any time during the sojourn of this case from its inception in Ramsey County Probate Court before Judge Glenn, followed by its appeal to Ramsey County District Court before Judge Anderson and its subsequent appeal to the Minnesota Supreme Court.

The second basis asserted by Petitioners in their claim of a denial of due process is that the issue of Mrs. Bush's right to renounce her husband's Will was not raised in the case before Judge Godfrey. In that action, Mrs. Bush vigorously defended her right to retain the $2,100,000 she received from the executors of her husband's estate to settle her threatened renunciation claim. This issue was raised in the pleadings by the Defendant Attorney General of the State of Minnesota and Defendant Class A Directors of The Bush Foundation. A percursory examination of Judge Godfrey's judgment substantiates that the issue was resolved in her favor. (A163, 165).

Finally, to say that there has never been evidence or a hearing in any court on any of the questions raised by Petitioners is to ignore the record which is replete with pleadings and documents containing statements and admissions of fact which were submitted by Mrs. Bush's attorneys on her behalf in the many courts her attorneys have guided her through.

CONCLUSION

There is no genuine constitutional question involved in this case. As did the Minnesota Supreme Court, this court also may ask what Petitioners expect to accomplish by the instant litigation. The only real question involved here is whether $62,000,000 ($100,000,000 as claimed by Petitioners) will pass to the intended legatee, The Bush Foundation, or will pass to a deceased woman's estate to endure further probate and diminution before coming to rest in another foundation over which these Petitioners have control. The Petition herein should be denied and Respondents allowed their cost and disbursements.

Respectfully submitted,

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ADDENDUM

NOTICE OF NON-REPRESENTATION BY CERTAIN COUNSEL

(Dated February 2, 1970)

(Ramsey County No. 356691—Caption omitted in printing)

To the Honorable Otis H. Godfrey, Jr. and all Counsel of Record:

PLEASE TAKE NOTICE that Messrs. T. C. Dillers, Thomas P. Healy, and Lord, Bissell and Brook all of Chicago, Illinois, no longer represent Mrs. Archibald G. Bush and Mr. H. Clifford Lee as "B" Directors of The Bush Foundation and as Plaintiffs in the above entitled action effective January 21, 1970.

You are also advised that Messrs. Benno F. Wolff, David C. Donnelly, John G. Robertson and Oppenheimer, Brown, Wolff, Leach and Foster continue to represent Mrs. Archibald G. Bush and Mr. H. Clifford Lee as "B" Directors of The Bush Foundation and as Plaintiffs in the above entitled action.

Mrs. Archibald G. Bush
By /s/ David R. Roberts
Her Attorney-In-Fact
And
By /s/ H. Clifford Lee
Her Attorney-In-Fact
/s/ H. Clifford Lee